Supreme Court, U.S.
FILED
MAR 27 2015
OFFICE OF THE CLERK

Nos. 14-556, 14 562, 14-571, and 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, ET AL., PETITIONERS
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICAE CURIAE* HEATHER BARWICK AND KATY FAUST IN SUPPORT OF RESPONDENTS

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(Additional captions listed on inside cover)

VALERIA TANCO, ET AL., PETITIONERS

v.

BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS

APRIL DEBOER, ET AL., PETITIONERS

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS

GREGORY BOURKE, ET AL., PETITIONERS

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS

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OTHER AUTHORITIES

Anonymous author, *Child of lesbian parents*, July 17, 2013, AnonymousUs.org, http://www.anonymousus.org/stories/story.php?sid=1554#.VQE57ZU5DX4.....33

Anonymous author, *I have two moms*, Feb. 5, 2015, AnonymousUs.org, http://www.anonymousus.org/stories/story.php?sid=1817#.....27

Anonymous author, *I have two moms. is it wrong to wish i had a dad?*, Yahoo! Answers (undated but seemingly from four or more years ago), https://answers.yahoo.com/question/index?qid=20110313184623AAgNgcz.....23-24

Anonymous author, *I'm the product of a my mother's egg and a sperm donor*, Oct. 12, 2014,

AnonymousUs.org, http://www.anonymousus.org/stories/story.php?sid=1729.....24

Anonymous author, *@kids who have gay moms on this site, just like me!*, AnonymousUs.org, Feb. 15, 2015, http://www.anonymousus.org/stories/story.php?sid=1831.....15-16

Br. of *Amici Curiae* Family Equality Council, COLAGE, and Kinsey Morrison in Supp. of Pet'rs, Addressing the Merits and Supporting Reversal, in Nos. 14-556, 14-562, 14-571 and 14-574 .....10, 21, 31, 33, 34-35

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Katy Faust, *Dear Justice Kennedy: An Open Letter from the Child of a Loving Gay Parent*, Public Discourse, Feb. 2, 2015, http://www.thepublicdiscourse.com/2015/02/14370/.....33

FreeAdvice Staff, *Can visitation be denied to a non-custodial parent?*, FreeAdvice (undated), http://family-law.freeadvice.com/family-law/child_custody/visitation_denied_non_custodial.htm#ixzz3SWsMHRcv.....15

Abigail Garner, *Families Like Mine* (HarperCollins, 2004).....5-6

Frank Ligtvoet, *The Misnomer of 'Motherless' Parenting*, N.Y. Times, June 22, 2013, *available at* http://www.nytimes.com/2013/06/23/opinion/

sunday/the-misnomer-of-motherless-parenting.html?_r=1&.....14-15

Nankitty, *cited to* The Experience Project, and *in* post by anonymous author, *Love is Hate*, AnonymousUs.org, July 13, 2014, http://www.anonymousus.org/stories/story.php?sid=1708.....16-17

NPR Staff, *What Happens When Kids Fall 'Far From The Tree'*, NPR Books, Nov. 8, 2012, 5:58 p.m., and also from 5:45-6:37 of linked tape recording, http://www.npr.org/2012/11/08/163468489/what-happens-when-kids-fall-far-from-the-tree.....21-22

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James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* (New York: HarperCollins, 2002).....3

AMICAE CURIAE STATEMENT OF INTEREST

The present *amicae curiae*, Heather Barwick and Katy Faust,[1] are respectfully filing this Brief in Support of Respondents. We write to this Court as children raised by women in committed same-sex relationships. While we love and cherish our mothers, we feel it's imperative that we bring to this Court's attention the impact that redefining marriage will have on children like us. We oppose gay marriage on the grounds that it violates children's rights and cannot provide children with the most foundational building blocks for child development - a mother and father living with and loving them.

SUMMARY OF ARGUMENT

Heather Barwick was raised by her mother and her mother's same-sex partner for most of her childhood. Despite having two loving female caregivers, Heather longed for a relationship with her father.

Katy Faust split time between the home of her father, and the home of her mother and mother's partner, from the time she was 10 years old. While her mother and her mother's partner offered her love and stability, her father had a distinct and irreplaceable impact on her development.

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[1] No party or its counsel wrote or helped write this brief, or gave money intended to fund its writing or submission, *see* S. Ct. R. 37. Blanket permission from Respondents to write briefs is filed with the Court, as is a letter of permission to *Amicae* from Petitioners.

Government's interest in marriage is children. Therefore, marriage law ought to reflect the reality that every child is born to a mother and father and that children have a natural right to a relationship with both parents. Children suffer emotional harm when they lose a relationship with one or both parents, which is categorically the case when they are raised by a same-sex couple. Regardless of how the child finds her way into a same-sex headed household - death of a parent, divorce, abandonment, or third-party reproduction - trauma will play a role in the child's life.

Institutionalizing same-sex marriage will encourage more adults to create families where either mother or father are excluded, and thus necessitate loss for the child of that union. Therein a child will lose not only a relationship with at least one biological parent, which all children crave, but the critical dual-gender influence in their daily life as well. Two loving women cannot replace a missing father. And two loving men cannot replace a child's mother. Government should institutionalize and promote only the family structure that ensures children's rights and well-being are protected.

ARGUMENT

I. Marriage is society's story of the rights and well-being of children

As this Court deliberates on whether or not to redefine marriage to include same-sex couples, the primary question is: What is government's interest in marriage? Is it to validate the emotional bonds of adults? Is it to stabilize adult partnerships? Is it an

instrument with which to give a stamp of equality to our gay brothers and sisters? Because if adults are the focus of our collective concern, then by all means redefine this institution which has spanned centuries, cultures, and religions to suit that intention.

Adults should be able to form consensual relationships of their choosing. The government should never impose barriers for people to live the lives they desire. That is why many of us supported domestic partnerships for gays and lesbians.

But the reality is that society's interest in marriage is not an adult-centric one at all. *Government's interest in marriage is children.* While a good marriage is about much more than children, government doesn't have an interest in any other aspect of adult romantic unions other than the children that such a union will produce.

As sociologist James Q. Wilson rightly stated: "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve. James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* 41 (New York: HarperCollins, 2002).

Various judges have agreed:

> While modern cultural changes have weakened the link between marriage and procreation in the popular mind,

> there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.

United States v. Windsor, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting);

> This Court is persuaded that Louisiana has a legitimate interest ... whether obsolete in the opinion of some, or not, in the opinion of others ... in linking children to an intact family formed by their two biological parents, as specifically underscored by Justice Kennedy in *Windsor*.

Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 923 (E.D. La. Sept. 3, 2014).

Most heterosexual marriages produce children. No homosexual marriages produce children. When it comes to procreation and childrearing, the two are intrinsically different.

Therefore, if this Court rules to redefine marriage, it rules to redefine parenthood as well.

Marriage policy is the story that government tells about the rights and well-being of children. And that story is not open to debate. Though laws and technology may change, the story of how children

come into being and the foundational components for child health - stability, a biological connection with both parents, and dual-gender influence - does not change. The question for this Court is whether or not law should support sociological and biological reality, or reflect adult emotions.

In this brief we shall attempt to share not just our own experience but that of other children of gay parents as well. We seek to give the raw, unvarnished side of this discussion, where children speak in their own words. The Court likely will not hear that side of the story when children living in the home of their gay parent are asked to contribute a quote for a brief supporting gay marriage, or when a reporter asks them about having "two moms." There is such great pressure on children of lesbians and gays to defend and protect their parents. This pressure may not come directly from their parents but from society at large, which tells them that anyone who doesn't support gay marriage is "homophobic" or "bigoted." One young man raised by lesbians put it this way:

> When I was young, I was very aware of the assumption: two women plus one son equals f[ ]cked-up guy. You get these very concerned liberal reporters asking "Didn't you miss your dad? Wasn't that hard?" This is an issue that cannot be boiled down to a sound bite. There is a real story about the whole question of my father, but then there was this public persona that I felt I had

> to present. [My lesbian parents] weren't coming to me and saying, "Don't talk about [your feelings about not knowing your dad]. You have to present yourself to be just fine." It was internal pressure. I felt protective of my family. You are aware of the political issue. You are aware of what you are saying and how they will judge you.

Abigail Garner, *Families Like Mine* 21 (Harper Collins, 2004) (first set of brackets not in original).

Because of the pressure on children of gays and lesbians to defend their parents, a feeling with which we deeply identify, seldom do we feel that we can be honest about our loss publicly.

A. Heather's Story

I was raised by my biological mother and her same-sex partner. I have only a few fuzzy memories of my father: a phone call here and there, his deep and unfamiliar voice wishing me a happy birthday, and a dim picture of the way the furniture had been arranged in his house. I have less than a handful of pictures of him. My mom and dad were married for a short time but she left him when I was too young to remember. She always knew she was gay and she wanted a chance to be happy with someone she really loved—with a woman.

I was raised in an area that was pretty liberal, open, and accepting of gays and lesbians. I know my mother experienced pain at the hands of others

because of her sexuality, but as a child of same-sex parents, I was never mistreated because of it. I had two loving mothers who cared for nearly my every need and with whom I have many wonderful and sweet memories. There was one need, however, that they could never meet no matter how much they loved me: the need for a father.

The pain in my life did not stem from the state not recognizing the relationship between my "two moms." It stemmed from the turmoil of desperately wanting a father. I love my mom deeply, fiercely, and unconditionally. She is an incredible woman, but I also love my absent father. I love a man whom I don't even know. A man who, by all accounts, is a lousy father. I don't know why I love him, I just do. I ached for my father to love me. I ached for the father I knew I would never have.

Do I wish my mom lived a miserable life married to a man she didn't love? No. I want my mom to be happy. But I also wish that she and my dad did love each other and that somehow it could have worked out. Two loving moms, or two dads, can never replace the lost parent. Accepting and promoting same-sex parenting guarantees that a child will miss out on their mother or father.

Growing up, and even into my 20's, I supported and advocated for gay marriage. It's only with some time and distance from my childhood that I'm able to reflect on my experiences and recognize the long-term consequences that same-sex parenting had on me. And it's only now, as I watch my children loving and being loved by their father each day, that I can

see the beauty and wisdom in traditional marriage and parenting.

B. Katy's Story

My parents struggled, valiantly I would say, to keep their marriage intact. But ultimately they divorced when I was 10. Contrary to what some might assume, their marriage did not dissolve because my mother was a closet lesbian. It was, like most divorces, complicated. I am devoted to my parents completely and strive to honor and respect them in the telling of my story. I will do my best to honestly share my thoughts without revealing sensitive information about them. The most important thing that you need to know about them is that I love them.

My parents' divorce was the beginning of several transitions in my life. Immediately following their announcement my mom moved to a rented room at a nearby house. My father then purchased his own place and my mother returned. She then fell in love with her first and only partner who moved in with us. My father also had a live-in girlfriend that came into their relationship with a child. Three years later, after my father had moved again and had a new woman in his life, I moved out of state to live with my grandmother for a year. Despite splitting time between two houses, both of my parents strove to stay connected with me and involved in my life. While they wisely did not expect me to treat their partners as my parent, there were certainly changes in house rules and dynamics with the arrival of a new adult.

In my mother's home, I was part of their community of women. I attended their soccer games, parties, and cheered on the marimba band that my mother and her partner lead. For the past 28 years both my mother and her partner have been involved in my major life events including graduations, my wedding, raising my children, and holiday celebrations, and my Fulbright year of study in Taiwan. While I wouldn't say that I had "two moms," I accepted my mom's partner as an important part of her life and member of the household. I now consider her my friend.

If childrearing were just about providing stability by any two parents regardless of gender, then my mom and her partner would have been everything that I needed in life. They cared for me. I cannot remember major strife in their home stemming from their relationship with each other or with me. But that was not enough.

My father and I have traveled a rockier path. We love each other and, like every girl, I longed for his affection. But there have been challenges that we've had to overcome to remain in relationship with one another. Despite those challenges, I can honestly say that there is a big piece of me that simply would not exist without my father's investment and love. It's not just because an adult took an interest in me, it's because HE took an interest in me. A man cherished me from birth to adulthood. Interacting with him made me confident and calm when I was around other men. He thought I was beautiful and told me I

was smart and strong. My mom and her partner said the same things as I grew, but there is a distinct filling of the heart when those words come from your father. And to this day, very little can compare to his words of approval. He is an imperfect father loving his imperfect daughter and his role in my life is irreplaceable.

Some might object that my story does not qualify in this discussion because I am not completely the product of gay parenting, rather, I am the product of divorce. But the truth is most children who have gay parents are the products of a prior heterosexual relationship. Most will not live with only their gay parent and partner for their entire life. If you look at COLAGE's (Children of Lesbians and Gays) criteria, both Heather and I would have qualified for participation in their organization. I would wager that there are children with backgrounds just like mine who are being quoted in the Family Equality Council et al. amicus brief in these cases ("FEC Brief").

Here's a blog post from Courtney Faria on COLAGE's website where she mentions looking forward to her two moms getting married in the summer. This is the kind of complex story that serves as a backdrop for many of the short quotes from children in the FEC Brief. Every child who is being raised within a same-sex headed household will have a story which involves loss. Courtney's post closely mirrors my story and emotions during my adolescence and teen years:

> My biological mom and dad were together until I was 10. . . .
>
> The existence of my family as one family unit has always been a hard thing for me. . . . There was a lot of hurt that came from the divorce between my parents. . . . [W]hen my family was newly divorced and even sometimes today, [my dad being a separate family unit] made my family story feel hard, complicated, sad, happy, loving, and what felt like too long for anyone to want to listen to, all at the same time. I love my family and have grown to love its complicated, difficult, but also resilient story.
>
> . . . My family felt stretched, complicated, and sometimes full of hurt.

Courtney Faria, *Guest Post from Courtney Faria!*, [in response to post by "Anonymous" who, like Faria, has two mothers and lost a father], KidSafe by COLAGE, July 2014, http://kidsafe.tumblr.com/post/90384236835/i-have-2-mums-and-a-dad-but-my-dad-died-years (last visited March 22, 2015, as with all Internet links herein).

In addition to sharing so many of Courtney's experiences, in high school I shared her views on gay marriage as well. I supported gay marriage out of a fierce protectiveness for my mother and her partner. It wasn't until I became a mother myself that the crucial need for both parents in the home, raising their children together, really sank in.

II. Children Have a Right to Know and Be Raised by Both Their Biological Mother and Father

Those in favor of redefining marriage speak of the "right to marry" and "the right to parenthood." Unfortunately, such language indicates that rights have lost their true meaning. They are now popularly employed as a label for anything that someone really, really wants. This is simply desire-based reasoning, which is entirely specious. True rights are those which cannot be given by any government, but which exist pre-government. Rights which are self-evident, as our Founding Fathers would say.

When you gaze upon a newborn what is true about her simply because she exists? Until the world starts to tell Baby Girl's story for her through whatever cultural or religious context she has been born into, there are two things that are true about her: she has life, and a man and woman made her. Thus two rights are hers because, just because, she is crying and squirming and breathing and yawning.

First, the right to live. Second, the right to have a relationship with her father and mother.

When a child loses her right to live, at least on this side of the womb, we severely punish the perpetrator. The loss of that right is nothing that government or any human agent will be able to replace or restore.

The same is true of the second right - the right to belong to one's parents. Losing those relationships is something that no human agent can replace or restore. As with their right to life, children cannot defend their right to their mother and father themselves, and it should therefore be protected by government. The U.N. gets this exactly right. Article 7 in their Convention on the Rights of the Child states, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents." *Id.*

Children have a right to their parents. No one has an automatic right to a child. We cannot normalize separating children from their natural parents or manipulating children into existence with the express intent to deny them a relationship with one parent just because adults have chosen a union which cannot produce children. It is an injustice to the child, pure and simple. We should not formally and officially incentivize a family structure where the child will be deprived of one natural parent, but mandating same-sex marriage will do just that.

Step back from the gay marriage debate for a moment and look at the lives of children you know. Perhaps, look at your own life. When a parent has been lost because of death, abandonment, estrangement, or divorce there is harm and pain. The child grieves, is angry, and mourns. Whether it is a longing to know the mysterious missing half of one's heritage or a life-long gaping wound, losing a

parent brings pain. No mentor, teacher, grandparent, Head Start program or role model can take the place of that absent mother or father. Even if the parent resurfaces later in life, each day that the parent was absent has been permanently lost.

This is how one gay father describes his daughter's suffering because of her missing parent:

> SOMETIMES when my daughter, who is 7, is nicely cuddled up in her bed and I snuggle her, she calls me Mommy. I am a stay-at-home dad. My male partner and I adopted both of our children at birth in open domestic adoptions. We could fill our home with nannies, sisters, grandmothers, female friends, but no mothers.
>
> My daughter says "Mommy" in a funny way, in a high-pitched voice. Although I refer the honors immediately to her birth mom, I am flattered. But saddened as well, because she expresses herself in a voice that is not her own. It is her stuffed-animal voice. She expresses not only love; she also expresses alienation. She can role-play the mother-daughter relationship, but she cannot use her real voice, nor have the real thing.

Frank Ligtvoet, *The Misnomer of 'Motherless' Parenting*, N.Y. Times, June 22, 2013, *available at*

http://www.nytimes.com/2013/06/23/opinion/sunday/the-misnomer-of-motherless-parenting.html?_r=1&.

Why has there been a dramatic shift toward open adoption? Because there has been a near-universal recognition that children benefit from having as many connections with their family of origin as possible. It is why many states now require that adoption records be open to children. Whenever possible, kids want to be connected to both biological parents.

In divorce and custody cases, judges make determinations based on the right and best interest of the child to know, and have access to, both parents barring a finding of unfitness. Family courts favor and encourage liberal visitation. It is, in fact, illegal to withhold or impede visitation of a non-custodial parent. (FreeAdvice Staff, *Can visitation be denied to a non-custodial parent?*, Free Advice (undated), http://family-law.freeadvice.com/family-law/child_custody/visitation_denied_non_custodial.htm#ixzz3SWsMHRcv.)

So why, if the benefits to children from being in relationship with both parents in these areas of family law are widely acknowledged, are we willing to put our stamp of approval on a family structure that will categorically deny a child the relationship that they not only have a right to, but that they crave?

> All my moms want is to have a baby, and have a biological family like

> everyone else. So I always thought what a terrible bitch (yes bitch) I am to destroy their happiness too, because I wished I just had a dad in my life and not a donor fake uncle. You have no idea how lonely and guilty I feel about this, but maybe you do? I feel like a bad child, especially when I look on TV and I see the good kids of gay parents say they have the perfect family and they don't need a mom or dad, but [the other children with gay moms on this site are] all like "but I want a dad... sometimes?"

Anonymous author, *@kids who have gay moms on this site, just like me!*, AnonymousUs.org, Feb. 15, 2015, http://www.anonymousus.org/stories/story.php?sid=1831;

> My Moms always made a good image. Smile everybody and pertend to be happy that was our family motto. But I didnt feel happy every time I came home from a friends house and saw how diffrent it was in their homes. My best friends dad was the greatest guy he was funny and nice and always taking us places. He listened to us. I was jealous of my friend and wrote the word Daddy on a peice of paper and put it under my pillow. I wanted a Daddy like my friend had. My friends family all knew how much I liked their Dad cuz I was always asking if I could help

> him. One day my friends mom asks me are you a Daddys Girl? It means you are the kind of girl who realy loves her Daddy and is real close to him. Well I went home and cried becuz I dont have that and never will know what thats like.

Nankitty, *cited to* The Experience Project, and *in* post by Anonymous author, *Love is Hate*, AnonymousUs org, July 13, 2014, http://www.anonymousus.org/stories/story.php?sid=1708.

(Heather's Experience)

Losing my father was a loss that I felt deeply. The pain from the wound my missing father left was at times so intense and overwhelming that as a young girl I asked my mom if she would send me to a counselor. Growing up without my dad colored everything about me. I had a hard time trusting and didn't let people get too close to me. Because if my father left me, they probably would too. It wasn't until my husband and I had children and I watched him with our kids that the full weight of what I'd lost with my own father hit me. And it hit me like a ton of bricks. Many people believe that so long as a child has two parents, missing a father or mother doesn't matter. But it does.

We should not be surprised that any child who is missing a parent longs to know their absent father or mother, regardless of what other adults are in the home. It is one of the deepest and most universal human longings.

III. Children Do Best When Raised By Their Biological Mother and Father, Each of Whom Brings Unique and Irreplaceable Gifts to Children and Families

Marriage is not just about a child's rights, though that should be enough for any court, political initiative or piece of legislation. It is also a question of the child thriving. Beyond the superficial stereotypes, gender is a real phenomenon. As children age, they benefit from daily interactions with both their father and mother. Even during infancy, studies have shown that children respond differently to male and female faces and voices.

For those who feel that there is no significant difference between men and women in a child's life, I hope that they would take that philosophy into every other area of human interaction. They should not object to an all-male Supreme Court because Justice Ginsburg, Justice Sotomayor, and Justice Kagan do not offer a unique perspective. We should not care if a low-income school district has all female teachers because strong male role models are unnecessary. And, if biological differences do not matter, we shouldn't be surprised to see our President surrounded by an all-female secret security entourage. The reality is that to say gender makes no meaningful difference in any scenario is silly. It's shocking when someone makes the case that genderless marriage will not affect the most vital societal concern of all - child development.

We have all the social evidence needed to authenticate the truth that children need both sexes

represented in their parentage. When a child is raised outside of an intact family, specifically without the involvement of their father, we see that the likelihood that they will be incarcerated skyrockets, they perform poorly in school, live in poverty, fall victim to trafficking, are sexually active at an earlier age and experience both poor physical and mental health. Fathers and mothers are staples in the diet of emotional food that children require. Without one or the other, they are emotionally malnourished.

(Heather) I did not have a father, grandfather, or any other man involved in my childhood. The adults in my life were mostly my mother's lesbian friends. I was surrounded by women who said they didn't need or want a man. Yet, as a little girl, I so desperately wanted a daddy. It is a strange and confusing thing to walk around with this deep down unquenchable ache for a father, for a man, in a community that says that men are unnecessary. There were times I felt so angry at my father for not being there for me, and then times I felt angry at myself for even wanting a father to begin with.

(Katy) My mother and her partner were steady. They cheered me on and encouraged me and were involved in my life. She and her partner are good women. But women don't father. And I needed a father. There is a part of me that I can almost scoop out and say, "See this? This is the part that my dad made." One of my best childhood memories is when he would throw me up in the air and catch me when he returned from work. Women tend to not throw their children - but kids love it, and it teaches them

something valuable about life, trust, and risk. My father put confidence in me, shaped my identity as a woman when he praised my accomplishments or cheered during my choir concerts. When he told me I looked beautiful while heading off to a high school dance, my "date nights" with him, or his stern rebuke when I forged his signature in shop class - all had a distinct impact on me that my mother and her partner simply could not provide.

IV. Mandating Same-Sex Marriage Will Promote Arrangements Where Children Are Intentionally Deprived of a Mother and Father

To institutionalize something is not just to allow it. It's not to "live and let live." With the redefinition of marriage, we are not simply allowing people to form relationships of their choosing. They have been doing so for decades. We can assure this Court that in the eighties and nineties, the community of women with whom our mothers had extensive contact were free to love whomever they chose to love.

When we institutionalize same-sex marriage, we move from *permitting* citizens the freedom to live as they choose, to *promoting* same-sex-headed households. In doing so, we ignore the true nature and purpose of marriage. Since the State's interest in marriage is children, now we are *normalizing* a family structure where a child will always be deprived daily of either his or her mother or father, and with that the relationship and unique contributions only a mother or father can bring. In today's familial carnage, with rising out-of-wedlock

births, unstable cohabiting partnerships, and rampant divorce, losing a full relationship with a parent happens frequently. But please do not confuse "frequent" with "normal." For a child, losing a parent is never "normal."

The FEC Brief argues that, "One or both biological parents may be missing from a child's life for many different reasons. Neither barring same-sex couples from marriage nor allowing them to marry can change this." *Id.* at 17. But when marriage is redefined into a genderless institution, our cultural narrative becomes one that, in essence, tells children that they have no right to the natural family structure or their biological parents.

Redefining marriage will *encourage* "biological parents [to] be missing from a child's life", *id.* It implicitly communicates that children exist for the satisfaction of adult desires. And stories such as Andrew Solomon's become incentivized by our government:

> When I met John, who is now my husband, he told me that he had had some friends, Tammy and Laura, for whom he had been a sperm donor, and that they had a son named Oliver, of whom he was the biological father. A few years later, they asked him to be a sperm donor again, and they produced a daughter, Lucy. A good friend of mine from college had gone through a divorce and said that she really longed to be a

> mother, and I said how much I would love to be the father of her child. And so we decided to produce a child through an IVF process. John and I then wanted to have a child who would live with us all the time, and we decided to use an egg donor, and Laura, the lesbian who had carried Oliver and Lucy, offered to be our surrogate as a way of thanking John for providing her with a family. So the shorthand is: five parents of four children in three states. ...

NPR Staff, *What Happens When Kids Fall 'Far From The Tree'* , NPR Books, Nov. 8, 2012, 5:58 p.m., text and also from 5:45-6:37 of linked tape recording, http://www.npr.org/2012/11/08/163468489/what-happens-when-kids-fall-far-from-the-tree.

In Andrew Solomon's "post-nuclear" family, as he calls it, *id.*, the children have been manipulated into existence to satisfy the desires of the adults. The four children living in three states were conceived with the intent to separate them from one of their biological parents. The desires of the five adults were satisfied. The rights of the four children—to be known and raised by their biological parents— were not.

Please understand what we are saying here, this is not about whether or not the gay parent is a "good" parent. Parenting is a skill that anyone, gay or straight, can learn.

(Katy) My mother modeled self-sacrifice, healthy communication, and was continually nurturing and generous. Honestly, I want to be like her in a thousand ways. Though it may go without saying, I'll say it anyway: my mother's critical influence in my life couldn't be replaced by two men, regardless of how nurturing and caring they might be.

(Heather) My mother, too, was wonderful. She told me she loved me every single day of my childhood. And she was completely committed to parenting me well. She is my rock

We are not saying that gays and lesbians are incapable of parenting. This is actually not about the gay parent at all. This is about the missing parent.

Talk to any child with gay parents, especially those old enough to reflect on their experiences. If this Court asks a child raised by a lesbian couple if they love their two moms, you'll probably get a resounding "yes!" Ask about their father, and you are in for either painful silence, a confession of gut-wrenching longing, or the recognition that they have a father that they wish they could see more often. The one thing that you will not hear is indifference. Because no child is indifferent when it comes to being separated from one biological parent. Even if they have come to terms with the separation, it was likely a difficult road to travel.

> i'm 17 and female.... i love my two lesbian moms of course, but sometimes when i see a little girl with her daddy, i get jealous, or i get emotional. i'm

> adopted too by the way. i've never met my dad, actually, for all i know he's dead. . . . i feel so guilty about wishing i had a dad. i wonder alot what it would be like and it does bother me a little bit when i see a little girl with her loving father. . . . also, do you think me not having a dad has anuthing to do with me going crazy over this [c. 30-year-old] married guy who was and still is so super nice and caring towards me?

Anonymous author, *I have two moms. is it wrong to wish i had a dad?*, Yahoo! Answers (undated but seemingly from four or more years ago), https://answers.yahoo.com/question/index?qid=20110313184623AAgNgcz;

> I am the daughter (not biological) of two moms. I love them both sooo sooo much but there is not a day that goes by that i didn't wish i had a dad. it is very hard for kids like me that are different. no matter how accetping society is. i have men in my life □ my moms' friends but it is not the same. I love my parents but I don't agree with the fact that I will never know half of my biology or my siblings. I will never do that to a child. . . .

Anonymous author, *I'm the product of a* [sic] *my mother's egg and a sperm donor*, Oct. 12, 2014, AnonymousUs.org, http://www.anonymousus.org/stories/story.php?sid=1729.

(Heather) I remember when I was around 10 years old my mom got paperwork together to change my last name to match hers. She'd kept her maiden name and I'd been given my father's last name. I remember the paperwork being spread out on the kitchen table as she explained why she thought it'd be a good idea. It did make sense. It created confusion at school with my teachers and my friends always ended up calling her by the wrong name. Plus I had a terrible last name and was teased relentlessly about it. But I couldn't do it. Thinking about it made me feel like I couldn't breathe, like the wind had been knocked out of me. I cried as I told her I couldn't do it and I said, "It's the only thing he's ever given me and I don't want to give it up."

V. Societies Should Strive to Provide for the Ideal Parenting Relationship for Children and Marriage Laws Do Just That

We are not so naïve as to say that gay marriage is the biggest or only threat to children having access to their mother and father. Pre-marital sex, cohabitation, and divorce are numerically a greater risk to this foundational right. But please note that there are no widespread efforts to institutionalize, glamorize, and legally incentivize those arrangements. Because frankly, if there were, we would oppose them too.

Same-sex parenting is just one of many ways that children are dealing with family brokenness. Same-sex parenting should not be viewed as the equivalent to the married-mother-father model. It more closely

mirrors the step-parent family, but without the critical dual-gender influence.

We know from decades of research on blended families—be it cohabitation or step-parenting—that non-biological parents tend to be less connected, spend less time and resources, be more transitory/unstable, and are more dangerous to children in the home than their biological parents. While we can certainly find examples of abusive biological fathers, as well as amazing step-fathers, statistically speaking, biological parents are the safest and provide the greatest long-term benefit for children.

Which is why we *must* avoid any law or decision which broadly sweeps away legal ties from biological parents and sweeps in legal control of the child to a non-biological adult. Legally detaching biological parents from children, and legally attaching them to biological strangers is sometimes necessary. But as a rule it should be arduous and rare.

Seldom do children, even in step-families, consider the biological parent's spouse full "father" or "mother." Why would we expect that children of gay couples would feel differently? While children tend to feel security and comfort as they watch their mother and father show affection to each other, the presence of a non-biological parent will often evoke feelings of competition between parent/partner/children. Same-sex households, by their very nature, are guaranteed to have at least one non-biological caregiver.

> I have two moms and it sucks. My dad was a donor and I'll probably never meet him. Anyways, I'm now at the age where it really sucks to be the only guy in my house (I have a sister along with my two moms). Oh, also, they've been divorced since I was three and still don't get along. Neither of them understand how to give me some space every now and then. . . . Honestly, I hate it. I hate everything about not having a dad or at least a brother in my family. . . . I have nothing in common with [my sister], and even less with her birth mom who I do not get along with at all. If it was just me and my birth mom I'd be a lot happier. . . .

Anonymous author, *I have two moms*, AnonymousUs.org, Feb. 5, 2015, http://www.anonymousus.org/stories/story.php?sid=1817#.

(Heather) My relationship with my "other mom" was awkward. She was a wonderful person and I have some fond memories with her but what I mostly remember is how uncomfortable the relationship felt to me. I was often jealous of the attention my mom gave her and would find ways to sit in between them on the couch or do other little things like that. I am grateful that she treated me so well, but despite the fact that she helped raise me from the time I was small, I never felt any sort of parent-child connection with her. When she and my mom split up I was sad because my mom was sad,

but if I am being honest I was also relieved to have my mom back to myself.

(Katy) As a child, I respected my mother's partner. I didn't feel combative toward her, but I also did not attach to her in a way that compared to my attachment with my mother, despite the same proximity to her as to my mother and many years of shared experience. I loved her because my mother loved her. I respected her because she was important to my mom. I know that she cares about me, and I care about her as well. But the road of our relationship ran through my mother.

Some argue that, for example, two loving and caring men make a better home than a drug-addicted single mom. We would not necessarily disagree with that. Katy actually traveled internationally with two women who were willing to adopt a girl who needed serious medical attention. Those two dear ladies were game to take on a child that no heterosexual couple in her home country, or ours really, would adopt. Clearly, that child will likely have a better life with these two women than in an under-staffed, under-funded foreign institution.

But let's be clear, once you step away from the married-mother-father home we are talking about degrees of brokenness. For the child, there is no such thing as an "intact" home when they are in a same-sex-headed household. To join that household they must lose one or both natural parents. Just because in a few cases a child who has found themselves in a

horrific situation would be better off with two parents of the same gender does not necessitate writing out of civil code the right to a relationship with one's natural parents. It doesn't justify the implicit statement that goes along with approval of same-sex marriage: mothers and fathers are interchangeable and therefore neither is necessary. That is not only a statistically-refuted lie, but a lie to which every child who has lost a parent can attest.

Lawyers presenting arguments for gay marriage in this case will likely cite studies where the researchers concluded that children in same-sex households allegedly fared "equally well" as those from intact biological homes. Leave aside the methodological problems with those studies, such as small, non-randomly derived participants, and just think for a moment.

If it is undisputed social science that children suffer when they are abandoned by their biological parents and then adopted, when their parents divorce, when one parent dies, or when they are donor-conceived, then how can it be possible that they are miraculously turning out "equally well" when raised in same-sex-headed households? Every child raised by "two moms" or "two dads" came to that household via one of those four traumatic methods. Does being raised "under the rainbow" miraculously wipe away all the negative effects and pain surrounding the loss and daily deprivation of one or both parents? The more likely explanation is that researchers are feeling the same pressure as the

rest of us feel to prove that they love their gay friends.

We are not saying that having a married mother and father guarantees success, health, and ease for any child. We are not saying that children of same-sex parents are doomed. There are no guarantees in this parenting gig. Neither are there silver bullets. But married mothers and fathers raising their children together is the model that most stacks the deck in the favor of children. We see it in the lives of our own children -- they simply do not have the stress, pressures, turmoil, and challenges that we had to face when we were their age: none of which had anything to do with the state not recognizing our mother's union, by the way.

Our children don't have to worry about their parents' relationships. They don't have to adapt to a new "mom" or new "parent" in their home. They don't have to wonder if they were the cause of the divorce or abandonment. They don't have to manage their parents' emotions and be flag-bearers of their parents' lifestyle in the face of, what they are told is, a hostile world. We have lived on both sides of this coin. And we can tell you, unequivocally, that our kids are better off than we were.

And it's not because we are perfect mothers. It's because we are parenting *with* our children's father, and our children's hearts are full.

We are parenting the families we wish we had had as children.

If society's interest in marriage is children, then why would we promote a family structure where a child would have to be denied a relationship with their mother or father so the adults can have the "family" they desire? Why, if some believe that they are "born gay," do many in the gay lobby seek to legally sever the more self-evident truth that children are "born" to both a mother and father? Why, if one popular gay-marriage mantra is that they do not want the government to tell them "who to love," would they tell children that being loved by one of their biological parents is unnecessary? These are obviously rhetorical questions meant to emphasize the desires of adults at the expense of those the Court is most concerned with protecting—children. The onus should always be on adults to orient their lives around the needs of children, not make children conform to the lifestyle of adults. We hope that this truth will be reflected in the Court's decision.

VI. Responses to Family Equality Council et al.

The FEC Brief states: "The major challenge most same-sex-parented families must surmount is nothing inherent in their family structure, but rather the societal and governmental disapproval that the challenged state laws represent and perpetuate." *Id.* at 24. It speaks of how children of same-sex parents are "psychologically burden[ed]", *id.* at 27, because "their parents aren't able to get married." *Id.* at 26 (quotation marks and footnote omitted).

While we recognize that the feelings of these children may be legitimate, we suggest that perhaps a lack of "marriage equality" is not the primary struggle that these children are facing. If a parent conceives a child with a member of the opposite sex (or enters into a contract to purchase sperm/eggs from the child's biological parent) and then chooses to raise that child with a biological stranger of the same sex, that child's life is going to be complicated.

It will be complicated because it will "inherently" exclude one parent that the child has a right to be in relationship with, a parent that the child desires to know and be loved by. It's quite common for children who have lost a parent through death, divorce, third-party reproduction or abandonment - the four ways that a child will arrive within a same-sex headed household - to feel "burdened." Because something precious to them has been lost.

We understand, and deeply identify with, the feeling of wanting to rise to the defense of one's parents. But the blame for that "psychological burden" doesn't belong on the state. Most children find themselves in same-sex-headed households because their parents have made decisions to separate them from one of their natural parents. In addition, many children may feel "burdened" because they long for a parent who they are told is unnecessary. Many of those children do not have permission within their home to give voice to the loss of their missing parent, which can lead to feeling like a "bad" child. Here's how one child with two moms puts it:

> Am I a bad daughter because I wish I had a Dad? Is there anyone else who has 2 Moms or 2 Dads who wonders what it would be like if they were born into a normal family? Is ther anyone else who wants to be able to use the word normal without gettin a lecture on what is normal???

Anonymous author, *Child of lesbian parents*, AnonymousUs.org, July 17, 2013, http://www.anonymousus.org/stories/story.php?sid=1554#.VQE57ZU5DX4.

Family Equality Council was kind enough to give a nod to an article I, Katy, wrote for Public Discourse, *Dear Justice Kennedy: An Open Letter from the Child of a Loving Gay Parent*, Feb. 2, 2015, http://www.thepublicdiscourse.com/2015/02/14370/, where I argued, *see id. passim*, for a child's right to be in relationship with both her mother and father. Permit me to respond to a few mistaken conclusions that their brief drew from my argument. They state: "Under Ms. Faust's rationale, only families headed by a biological mother and father are worthy of recognition. By logical extension, infertile couples or couples who plan to adopt children should also be denied the right to marry." *Id.* at 17-18.

First, I know many an "infertile" heterosexual couple, as well as heterosexual couples who swore they'd never have children, who are now parenting a noisy houseful of little ones - created through their conjugal union. Heterosexual sex creates life. Even when couples are told it's "impossible" or they are

using "protection" or the parents don't want children, life finds a way, doesn't it? In this sense, heterosexual and homosexual relationships are categorically different. Promoting heterosexual marriage, with norms of permanence and exclusivity for any life that will result from their union, therefore serves a critical societal function. And a critical function for children.

Second, as the former Assistant Director for the largest Chinese adoption agency in the U.S., and as an adoptive mother myself, I am a passionate advocate of adoption. I understand deeply the need for loving adoptive parents. But we must be careful to view adoption rightly - that is, as means to give needy children a home. It should not be viewed as a means for adults to get kids. Couples who "plan to adopt children" ought to do so based on a child's need for parents, not primarily to meet their desire for a family. Children who are recovering from the wounds of abandonment especially need both father and mother. While this ideal is not always available to children, the pairing that most approximates the biological family should be sought whenever possible.

Third, Family Equality Council brushes over the heart of the problem with gay parenting - the missing parent. They cite only one child who dares to voice his loss over his missing father, fifteen-year-old "J.M." The comfort J.M. receives is not that his missing father is replaced by his two mothers, but that he realizes that everyone experiences pain when they have lost a parent.

> Over the years, there have been several occasions when it felt strange not to have a dad, but I have friends who have dads who are not part of their lives, and friends who have had a dad or mom die. In the end, I realize what counts is having two parents who love and support you.

Id. at 18 (footnote omitted). And this is exactly our point. Same-sex parenting is not unique in the alternative family landscape. What is unique is promoting an alternative parenting structure guaranteed to deny a child's right to a biological parent. In no other situation does society promote such a loss. It doesn't matter who the "new" parent is, losing one of the first parents will always feel "strange."

Fourth, while their brief mentioned the trauma over my parents' divorce, they omitted the part of my article where I talk about the refrain I often repeated during my childhood, "I'm so happy that my parents got divorced so that I could know all of you wonderful women." I said similar things to my father and his girlfriends. Despite the fact that I did love the women in my mom and dad's life, no child is "so happy" that their parents divorced. Rather, children love their parents and want to please them, even if it means hiding personal pain to bring that about.

* * *

The Court may be wondering why the FEC Brief is filled with quotes from children supporting gay

marriage and there are comparatively few of us, children of same-sex parents, who are filing briefs in support of natural marriage. The reason is because there is a cost to standing against gay marriage, especially with our backgrounds. Most people, let alone children who adore their gay parent, will not risk the heat that goes with opposing the acrimony of pro-gay-marriage forces. They cannot bear being labeled "anti-gay" when the people they love most in life are... gay. So ingrained is the narrative that you must hate gay people to oppose gay marriage/ parenting that for years the two of us could not bring ourselves to state that children deserve to be raised by their father and mother. Of all people, the label of "bigot," "homophobe," and "hater" stings us the most - because we are children of the LGBT "civil rights" movement. They raised us. In so many ways, lesbians and gays are our people.

Regardless of how this Court chooses to rule, we want the children of gay parents who come after us to know that they mattered. They were worth speaking up for. They are not simply part of the cost of doing the political business of the day or "acceptable casualties" so that we can all prove to be allies of the LGBT community, and pat ourselves on the back for being "progressive." No. We love our parents and we know that they do too. But they have lost something precious. And we will not join the chorus of those celebrating the loss of their parent, or the destruction of the home they once shared with both mother and father, as a "triumph of civil rights." We are willing to risk jobs, friendships, reputations, and even relationships with our beloved

family members to state the painfully obvious fact that, though they love their gay parent, the same-sex-headed household involved great personal loss for children raised under them.

Despite how well-intentioned the "two moms" or "two dads" may be, this court should be careful about elevating the choices of adults which deny a child a relationship with their mother or father. When gay couples have "equal access" to the institution of marriage it means that children will not have "equal access" to parents influencing and raising them the way nature intended.

This Court must either side with adult desires or side with children's rights. But it cannot do both.

CONCLUSION

Amicae respectfully ask the Court to uphold the judgment of the court of appeals; and humbly thank the Court for its time and consideration.

March 24, 2015 Respectfully submitted,

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